In the
Supreme Court of the United States.

OCTOBER TERM, 1977.

No. . 77-2061

ELIAS KENAAN,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

MARTIN G. WEINBERG,
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BATEMAN & SLADE, INC., BOSTON, MASSACHUSETTS.

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UNITED STATES OF AMERICA,
RESPONDENT.

Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

Elias Kenaan petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit entered in this case on July 7, 1977.

Opinions Below.

The opinion of the court of appeals, not yet reported, is reprinted in the Appendix, *infra*, at p. 6a. The opinion of the United States District Court for the District of Massachusetts (Caffrey, C.J.) is reported at 422 F. Supp. 226, and reprinted in the Appendix, *infra*, at p. 1a.

Jurisdiction.

The judgment of the court of appeals was entered on July 7, 1977, and is reprinted in the Appendix, *infra*, at p. 16a. The court's jurisdiction to review the judgment of the court of appeals is invoked under 28 U.S.C. § 1254(1).

Question Presented.

Whether the remedial provisions of the Interstate Agreement on Detainers Act must be applied to the transfer of a state prisoner to federal custody for purposes of trial when the transfer is effectuated by means of a writ of habeas corpus ad prosequendum?

Statutory Provisions Involved.

Section 2 of the Interstate Agreement on Detainers Act, 84 Stat. 1397, 18 U.S.C. App., p. 4475, provides in pertinent part:

INTERSTATE AGREEMENT ON DETAINERS.

Sec. 2. The Interstate Agreement on Detainers is hereby enacted into law and entered into by the United States on its own behalf and on behalf of the District of Columbia with all jurisdictions legally joining in substantially the following form:

"The contracting States solemnly agree that:

"Article I

"The party States find that charges outstanding against a prisoner, detainers based on untried indictments, informations, or complaints and difficulties in securing speedy trial of persons already incarcerated in other jurisdictions, produce uncertainties which obstruct programs of prisoner treatment and rehabilitation. Accordingly, it is the policy of the party States and the purpose of this agreement to encourage the expeditious and orderly disposition of such charges and determination of the proper status of any and all detainers based on untried indictments, informations, or complaints. The party States also find that proceedings with reference to such charges and detainers, when emanating from another jurisdiction, cannot properly be had in the absence of cooperative procedures. It is the further purpose of this agreement to provide such cooperative procedures.

"Article II

"As used in this agreement:

"(a) 'State' shall mean a State of the United States; the United States of America; a territory or possession of the United States; the District of Columbia; the Commonwealth of Puerto Rico.

"(b) 'Sending State' shall mean a State in which a prisoner is incarcerated at the time that he initiates a request for final disposition pursuant to article III hereof or at the time that a request for custody or availability is initiated pursuant to article IV hereof.

"(c) 'Receiving State' shall mean the State in which trial is to be had on an indictment, information, or complaint pursuant to article III or article IV hereof.

. . . . . .

"Article IV

"(a) The appropriate officer of the jurisdiction in which an untried indictment, information, or complaint is pending shall be entitled to have a prisoner against whom he has lodged a detainer and who is serving a term of imprisonment in any party State made available in accordance with article V(a) hereof upon presentation of a written request for temporary custody or availability to the appropriate authorities of the State in which the prisoner is incarcerated; Provided, That the court having jurisdiction of such indictment, information, or complaint shall have duly approved, recorded, and transmitted the request: And provided further, That there shall be a period of thirty days after receipt by the appropriate authorities before the

request be honored, within which period the Governor of the sending State may disapprove the request for temporary custody or availability, either upon his own motion or upon motion of the prisoner.

. . . . . .

"(e) If trial is not had on any indictment, information, or complaint contemplated hereby prior to the prisoner's being returned to the original place of imprisonment pursuant to article V(e) hereof, such indictment, information, or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice.

. . . . . .

"Article VIII

"This agreement shall enter into full force and effect as to a party State when such State has enacted the same into law. A State party to this agreement may withdraw herefrom by enacting a statute repealing the same. However, the withdrawal of any State shall not affect the status of any proceedings already initiated by inmates or by State officers at the time such withdrawal takes effect, nor shall it affect their rights in respect thereof.

"Article IX

"This agreement shall be liberally construed so as to effectuate its purposes. The provisions of this agreement shall be severable and if any phrase, clause, sentence, or provision of this agreement is declared to

be contrary to the constitution of any party State or of the United States or the applicability thereof to any government, agency, person, or circumstance is held invalid, the validity of the remainder of this agreement and the applicability thereof to any government, agency, person, or circumstance shall not be affected thereby. If this agreement shall be held contrary to the constitution of any State party hereto, the agreement shall remain in full force and effect as to the remaining States and in full force and effect as to the State affected as to all severable matters."

Title 28, United States Code, § 2241, provides in pertinent part:

§ 2241. Power to grant writ

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

. . . . . .

(c) The writ of habeas corpus shall not extend to a prisoner unless —

. . . . . .

(5) It is necessary to bring him into court to testify or for trial.

. . . . . .

Statement of the Case.

The facts of this case are not in dispute. On April 13, 1976, a federal grand jury sitting in the District of Massachusetts returned an indictment against the petitioner, Elias Kenaan, charging him with six counts of income tax evasion, in violation of 26 U.S.C. §§ 7201 and 7206(1). At that time he was incarcerated in the Lawrence House of Correction, Lawrence, Massachusetts, serving a sentence imposed by the Commonwealth of Massachusetts. On April 30, 1976, Kenaan was transferred pursuant to a federally issued writ of habeas corpus ad prosequendum from the Lawrence House of Correction to the United States District Court in Boston, Massachusetts, for purposes of arraignment. He was returned to the Lawrence House of Correction and the custody of the Commonwealth of Massachusetts that same day. A second writ of habeas corpus ad prosequendum was issued on June 25, 1976, and on June 28, 1976, petitioner was again transferred from the Lawrence House of Correction to the United States District Court in Boston, where he offered a guilty plea pursuant to Rule 11(e) of the Federal Rules of Criminal Procedure. The court declined to accept his plea and he was again returned to the Lawrence House of Correction and the custody of the Commonwealth of Massachusetts.

Petitioner filed a motion to dismiss the indictment on August 16, 1976, alleging that since both the Commonwealth of Massachusetts and the United States were parties to the Interstate Agreement on Detainers ("Agreement")[1]

[1] The United States joined the Agreement by Act of December 9, 1970, Pub. L. No. 91-538, §§ 1-8, 84 Stat. 1397, 18 U.S.C. App., p. 4475. The Commonwealth of Massachusetts joined the Agreement by Act of January 7, 1966, c. 892, Mass. Acts, reprinted in Mass. G.L. c. 276 App., p. 261 (West, 1972).

the actions of the United States in obtaining his custody from the Commonwealth of Massachusetts, and returning him to his original place of imprisonment prior to the completion of the federal proceedings against him, violated Article IV(e) of the Agreement even though the transfers were technically effectuated by means of writs of habeas corpus ad prosequendum.

Rejecting the government's arguments that the United States participated in the Agreement only as a "sending state" and that the provisions of the Agreement were inapplicable when a writ of habeas corpus and not the formal statutory mechanism was utilized to obtain custody of a state prisoner, the district court (Caffrey, C.J.) granted Kenaan's motion, holding that "[t]he United States participates [in the Agreement] as both a sending and receiving state" and that "[t]he IAD is the exclusive method of transfer. While the writ of habeas corpus may still issue to effect a transfer of a state prisoner for the purposes of trial on a federal indictment, the IAD limits the use of such writ to one transfer." A. 4a.

The government appealed to the United States Court of Appeals for the First Circuit, arguing that the district court erred both in applying the Agreement to the United States as a "receiving state" and in holding that a writ of habeas corpus ad prosequendum should be treated as a detainer under the Agreement. On July 7, 1977, the court of appeals reversed the district court's order of dismissal and remanded the case to the district court, holding that the Interstate Agreement on Detainers Act was not the exclusive means by which the United States could obtain custody of a state prisoner for federal prosecution and that transfers

pursuant to writs of habeas corpus ad prosequendum were not subject to the provisions of the Agreement.[1]

On July 19, 1977, the court of appeals granted petitioner's motion for a stay of mandate pending the timely filing of this petition. The court's order is reprinted in the Appendix at p. 17a, *infra*.

Reasons for Granting the Writ.

This is a case ideally suited for review by this Court. The facts are undisputed. It raises pure questions of statutory interpretation concerning the scope of the Interstate Agreement on Detainers Act and its applicability where the federal government has utilized a writ of habeas corpus ad prosequendum to obtain the custody of a state prisoner for purposes of a pending federal prosecution. Because the decision below substantially undercuts the statutory protections afforded to state prisoners transferred to federal custody for criminal prosecution, and is in conflict with the rulings of other circuits, it should be reviewed by this Court.

I. The Decision Below is in Conflict with the Rulings of Other United States Courts of Appeals.

The interrelationship of the Interstate Agreement on Detainers Act and the writ of habeas corpus ad prose-

[1] The court found it unnecessary to decide whether the United States participated in the Agreement as both a sending and receiving state, but noted that "[w]ere we required to decide the question, we would, on this record, conclude that the United States participates as both a sending and a receiving State." A. 10a n. 6.

quendum has been the subject of much recent litigation throughout the federal judiciary. The decisions of various courts of appeals have resulted in a conflict in the circuits concerning the issue presented by this petition as well as related subsidiary questions. The Second Circuit has held that, to effectuate the Agreement, a federally issued writ of habeas corpus ad prosequendum must be treated as a detainer, mandating compliance with the provisions of Article IV of the Agreement. *United States* v. *Mauro*, 544 F. 2d 588, 592 (1976), petition for a writ of certiorari pending, No. 76-1596. The Sixth Circuit has concluded that such a writ constitutes both a detainer and a written request for temporary custody under the Agreement. *United States* v. *Roberts*, 548 F. 2d 665, 670 (1977).[3] The Fifth Circuit and the court of appeals below have held the Agreement inapplicable when a writ of habeas corpus is the transfer mechanism utilized by the federal government to bring a state prisoner to trial. *United States* v. *Scallion*, 548 F. 2d 1168, 1173 (1977), petition for a writ of certiorari pending, No. 76-6559. The Seventh Circuit has also held that a writ of habeas corpus is not a detainer. *United States* v. *Ricketson*, 498 F. 2d 367, 373 (1974), cert. den. 419 U.S. 965 (1974). The Third Circuit has held that the protections of the Agreement must be applied where a federal prisoner is transferred to state custody and brought to trial by means of a state-issued writ of habeas corpus ad prosequendum (*United States ex rel. Esola* v. *Groomes*, 520 F. 2d 830 (1976)) and the effect of the utilization of such a writ by federal authorities is currently pending before the full court. *United States* v. *Sorrell*, 3d Cir., No. 76-1647,

[3] The Sixth Circuit did not discuss the rationale behind its conclusion since its decision was predicated on the appellant's pre-trial detainee status.

decided November 29, 1976, vacated January 27, 1977, argued *en banc* May 12, 1977. The issue is also currently pending in both the Eighth and the Ninth Circuits. *Speed* v. *United States*, No. 76-1126 (8th Cir.);[4] *United States* v. *Adkins*, No. 76-3523 (9th Cir.).

The applicability of the protections of the Interstate Agreement on Detainers Act to state prisoners transferred to federal custody for prosecution pursuant to writs of habeas corpus ad prosequendum is an issue of importance to both the prisoner and the prosecuter. The sanction imposed by Article IV(e) of the Agreement is severe — dismissal of the indictment with prejudice. A definitive interpretation by this Court is necessary to resolve the conflict in the circuits and ensure the equitable, consistent and uniform administration of justice throughout the federal judicial system.

II. The Remedial Provisions of the Interstate Agreement on Detainers Act Apply to the Transfer of a State Prisoner to Federal Custody for Purposes of Trial Even if the Transfer is Technically Effectuated by Means of a Writ of Habeas Corpus ad Prosequendum.

In reversing the order of the district court, the court of appeals concluded that application of the Agreement where a writ of habeas corpus ad prosequendum is utilized as the technical means of effectuating the transfer of a state prisoner to federal custody to dispose of pending federal charges would not promote the purposes of the legislation

[4] In both *Speed* and *Sorrell*, detainers had been placed on state prisoners. Thus the question before the courts is whether the writ of habeas corpus constitutes a request under the Agreement.

and would impliedly repeal the habeas corpus statute without any express Congressional intent to do so. Petitioner submits that both prongs of this analysis are erroneous and this Court should, therefore, grant certiorari and reverse the judgment below.

The Interstate Agreement on Detainers Act is a remedial measure designed to benefit the incarcerated individual facing criminal prosecution in another jurisdiction by relieving the uncertainty produced by "charges outstanding against a prisoner, detainers based on untried indictments, informations, or complaints and difficulties in securing speedy trial . . . which obstruct programs of prisoner treatment and rehabilitation." 18 U.S.C. App., Article I. These negative effects accrue not only from the actual transfer of the prisoner, but also from the psychological strain resulting from uncertainty about a future sentence — a state of mind that can arise from knowledge of an outstanding charge even if no formal detainer has been filed. A prisoner who learns of an outstanding charge when he is transferred by means of a writ of habeas corpus ad prosequendum, and is then returned to the sending jurisdiction without disposition of the pending charge, possesses the same uncertain state of mind as a prisoner who has learned that a detainer has been filed against him. Both processes serve to put the prisoner on notice as to the pending charge. Under such circumstances the writ is the functional equivalent of the detainer and must be construed as one.

Moreover, well established rules of statutory construction, as well as Article IX of the Agreement itself,[5] mandate that it be liberally construed in favor of the prisoner-defendant, its intended beneficiary. As this Court has stated, it is a

[5] Article IX specifically provides that "[t]his agreement shall be liberally construed so as to effectuate its purposes."

"familiar canon of statutory construction that remedial legislation should be construed broadly to effectuate its purposes." *Tcherepnin* v. *Knight*, 389 U.S. 332, 336 (1967). Such a construction requires a rule that, when available, the Interstate Agreement on Detainers Act is the exclusive method of transfer and a writ of habeas corpus ad prosequendum constitutes both a detainer and a request under the Agreement. *United States* v. *Mauro, supra*; *United States* v. *Roberts, supra*; *United States ex rel. Esola* v. *Groomes, supra.*

Nor does requiring that a writ of habeas corpus ad prosequendum be deemed both a detainer and a request under the Agreement impliedly repeal a portion of the habeas corpus statute (§ 2241(c)(5)). Rather, it is consistent with and does no violence to the appropriate use of the writ. It is a well recognized rule of statutory construction that "[w]here one statute deals with a subject in general terms, and another deals with a part of the same subject in a more detailed way, the two should be harmonized if possible; but if there is any conflict, the latter will prevail." Sutherland, *Statutory Construction*, 4th Ed., Text and Commentary, vol. 2A, § 51.05, p. 315. See also, *Preiser* v. *Rodriguez*, 411 U.S. 475, 489-490 (1973). 28 U.S.C. § 2241(c)(5) deals with the subject of the production of a state prisoner in federal court in general terms. The Interstate Agreement on Detainers Act deals with a part of the same subject — the production of a state prisoner in federal court for purposes of facing pending charges. In addition to being more detailed, it provides protections unavailable to a prisoner under the general habeas corpus statute. The two can be harmonized. Where the Agreement is available, its protections must be afforded; therefore, in those instances the writ constitutes a detainer and a request for production.

Where the Agreement is not available[6] § 2241(c)(5) remains the appropriate method for the federal government to bring a state prisoner to trial.

To hold, as did the court of appeals below, that the use of a writ of habeas corpus ad prosequendum to obtain the custody of a state prisoner for federal prosecution removes the transfer from the ambit of the Agreement is, in effect, to render the Agreement meaningless and little more than an exercise in legislative futility. The government can circumvent its protective requirements at will by the simple expedient of utilizing the writ rather than filing a formal detainer. Moreover, under the theory of the court of appeals the District of Columbia and the forty-six states which are also parties to the Agreement could similarly evade its proscriptions and abrogate its protections by utilizing state-issued writs of habeas corpus ad prosequendum to obtain the custody of a federal prisoner for trial.[7]

The express purpose of the Interstate Agreement on Detainers Act is to relieve incarcerated individuals of the debilitating effects that flow from uncertainty as to the course of pending prosecutions in other jurisdictions. By permitting circumvention of this legislative objective at will, the First Circuit has only created additional uncertainty.

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[6] When Congress adopted the Agreement in 1970, only twenty-five states were parties to it. Presently only four are not.

[7] As this Court has noted, a state can obtain custody of a federal prisoner for prosecution on a pending state charge by issuing a writ of habeas corpus ad prosequendum. "Almost invariably, the United States has complied with such writs and extended its cooperation to the state authorities." *Smith* v. *Hooey*, 393 U.S. 374, 381 n. 13 (1969). See also, Bureau of Prisons Policy Statement No. 7500.14A (1), cited in *United States ex rel. Esola* v. *Groomes*, 520 F. 2d 830, 836 n. 19 (3d Cir. 1975); *Marsino* v. *Higgins*, 10 F. 2d 534 (D. Mass. 1924), aff'd per curiam, 270 U.S. 627 (1926).

This Court should, therefore, grant certiorari and reverse the judgment below.

Conclusion.

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Appendix.

United States District Court, District of Massachusetts.

No. 76-157-C.

UNITED STATES
v.
ELIAS KENAAN.

October 28, 1976.

Jeremiah T. O'Sullivan, Special Atty., U. S. Dept of Justice, Boston, Mass., for plaintiff.

Martin G. Weinberg, Boston, Mass., for defendant.

Opinion.

Caffrey, Chief Judge.

This matter came before the Court on the basis of defendant's motion to dismiss the indictment. The matter was briefed and argued by counsel. The undisputed facts are that the defendant was serving a state sentence in the Lawrence House of Correction on April 13, 1976, when a federal grand jury returned an indictment charging him with six counts of income tax evasion. He was twice transferred from the House of Correction to this court

pursuant to Writs of Habeas Corpus Ad Prosequendum. 28 U.S.C. § 2241. The first transfer was for bail and arraignment purposes on April 30, 1976. The second, on June 28, 1976, was for the purpose of offering a Rule 11(e) guilty plea, which plea the Court declined to accept. On both occasions he was returned to the Lawrence House of Correction, where he remains today.

The defendant's motion to dismiss is based on the Interstate Agreement on Detainers (IAD), 18 U.S.C. App. (Supp. 1975). Essentially, this is an interstate compact, adopted by some 46 states and the United States. It is intended to facilitate the orderly disposition of untried indictments in jurisdictions other than the one in which the prisoner is held. Under the agreement, once a detainer is filed in the state of incarceration, either the prisoner or the indicting state (receiving state) may demand a transfer of the prisoner to the indicting jurisdiction for the purpose of trial. The agreement provides that once a transfer is so made trial must commence within 180 days in the case of a prisoner's demand or 120 days in the case of the indicting state's demand. Article IV(e) of the agreement provides:

> "If trial is not had on any indictment, information, or complaint contemplated hereby prior to the prisoner's being returned to the original place of imprisonment pursuant to Article V(e), hereof, such indictment, information, or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice."

The IAD was enacted into law by Congress on December 9, 1970. "State," under the agreement, includes the United States of America and its participation is in every way identical to that of the individual states, the District of Columbia, and the Commonwealth of Puerto Rico.

The following questions are before the Court:

(1) whether the IAD is the exclusive method of transfer; and (2) whether the participation of the United States in the IAD is as the sending state only or as both sending state and receiving state.

The Government's position is that the IAD is not the exclusive means of transfer, that the writ of habeas corpus is an additional means of transfer. The Government also contends that the United States is limited, under the agreement, to the role of a sending state only.

The legislative history of the Act indicates that Congress was attempting to afford to federal prisoners the rights of a speedy trial and an uninterrupted program of rehabilitation. The legislative history does not indicate that the Congress was attempting to afford those same rights to state prisoners awaiting trial on federal charges. However, the Act as enacted by Congress does not limit the participation of the United States to that of a sending state only. The Government points out that the Committee Report on the 1975 Criminal Justice Reform Act (S-1) suggests that the United States amend the IAD so that its participation would be limited to that of a sending state. As yet this proposed amendment has not been enacted into law.

The only cases which thus far have been decided regarding the IAD have held that the Courts are bound by the statute as written and not by the construction offered by the Government. In *United States* v. *Sorrell*, 413 F. Supp. 138 (E.D. Pa. 1976), Chief Judge Lord found, on facts identical to those of the instant case, that the language of Article IV(e) controls and that the fact that the IAD is the exclusive means of effecting transfer. He further found that the federal court is in the same geographical state as the incarcerating state is irrelevant, and that under the agreement one transfer is all that is allowed.

In *United States* v. *Mauro*, 414 F. Supp. 358 (E.D. N.Y. 1976), Judge Bartels held that the United States is a receiving state as well as a sending state. He suggested that an amendment to the agreement be enacted allowing prisoners to be transferred for the purposes of trial, but felt himself bound, as did Judge Lord, by the agreement as enacted. See also, *United States ex rel. Esola* v. *Groomes*, 520 F. 2d 830 (3 Cir. 1975). On October 26, 1976, the Court of Appeals for the Second Circuit handed down an opinion affirming the rulings made by Judge Bartels in *United States* v. *Mauro, supra.* See *United States* v. *Mauro*, 544 F. 2d 588, 1976.

Accordingly, I rule that

1. The IAD is the exclusive method of transfer. While the writ of habeas corpus may still issue to effect a transfer of a state prisoner for the purposes of trial on a federal indictment, the IAD limits the use of such writ to one transfer.

2. The participation of the United States in the IAD is not limited to that of a sending state only. The United States participates as both a sending and receiving state under the express wording of the agreement and under the cases construing that agreement. While the legislative history of the Act indicates that Congress was attempting to alleviate the problems of federal prisoners, there is nothing in the Act itself nor in the legislative history to indicate that Congress intended these rights to apply to federal prisoners exclusively and not to state prisoners.

3. Since the defendant was transferred from the Lawrence House of Correction twice without being tried on the indictment, the indictment must, under Article IV(e), be dismissed with prejudice. In so deciding, this Court is ruling in accord with the decisions of the only Circuit and District Courts which have previously passed on this issue.

While the Government's argument that such a result was not foreseen by Congress is not without some appeal, it is more appropriately directed toward the Congress than toward this Court.

ORDER accordingly.

United States Court of Appeals for the First Circuit

No. 77-1014

UNITED STATES OF AMERICA,
APPELLANT,
v.
ELIAS KENAAN,
DEFENDANT, APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[HON. ANDREW A. CAFFREY, *U.S. District Judge*]

Before COFFIN, *Chief Judge*,
CAMPBELL, *Circuit Judge*, and
MARKEY,* *Chief Judge*.

Jeremiah T. O'Sullivan, Special Attorney, Department of Justice, with whom *James N. Gabriel*, United States Attorney, and *Gerald E. McDowell*, Special Attorney, Department of Justice, were on brief, for appellant.
James W. Lawson, with whom *Martin G. Weinberg*, *Judith H. Misner*, and *Oteri & Weinberg* were on brief, for appellee.

July 7, 1977

MARKEY, *Chief Judge*.

This is an appeal by the United States from an order of the United States District Court for the District of Massachusetts granting appellee's (Kenaan's) motion to dismiss an indictment on the ground that the Government had violated Article IV(e) of the Interstate Agreement on Detainers Act ("Agreement")[1] by transferring Kenaan from

*Of the Court of Customs and Patent Appeals, sitting by designation.

[1] Pub. L. No. 91-538, §§ 1-8, 84 Stat. 1397 (1970), *reprinted in* 18 U.S.C.A. App. at 207 (West Supp. 1976); Act of Jan. 7, 1966, ch. 892, Mass. Acts, *reprinted in* MASS ANN. LAWS. special, at 603, (Michie/Law. Co-op 1967).

state to federal custody pursuant to a writ of habeas corpus ad prosequendum and then not trying him before returning him to state control.[2] We reverse and remand.

Facts

On April 13, 1976, Kenaan was indicted by a grand jury of the District of Massachusetts for violations of the Internal Revenue Code.[3] At that time he was serving a sentence at the Lawrence House of Correction in Massachusetts for violation of that state's narcotics laws. On April 30, 1976, Kenaan was transferred to the United States District Court pursuant to a writ of habeas corpus ad prosequendum[4] issued by that court for the purpose of arraignment. Kenaan was arraigned and returned immediately thereafter to state custody. On June 28, 1976, Kenaan was again transferred to the same District Court pursuant to a second writ of habeas corpus ad prosequendum, this time to offer a guilty plea to the indictment. He was returned to state custody when the court declined to accept his guilty plea.

On August 16, 1976, Kenaan filed a motion to dismiss the indictment with prejudice, basing his motion on Article IV(e) of the Agreement. The motion was granted on October 28, 1976. Notice of this appeal was filed by the Government on November 22, 1976.

[2] The opinion is reported at 422 F. Supp. 226.

[3] The indictment charged Kenaan with wilfully evading the payment of income taxes and filing knowingly false income tax returns for the calendar years 1969, 1970 and 1971 in violation of 26 U.S.C. §§ 7201 and 7206(1).

[4] 28 U.S.C. § 2241 states in pertinent part:
§ 2241. Power to grant writ
(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.
* * *
(c) The writ of habeas corpus shall not extend to a prisoner unless —
* * *
(5) It is necessary to bring him into court to testify or for trial.

Background

The Interstate Agreement on Detainers Act was enacted in 1970 by Congress on behalf of the United States and is now in force in 46 states. Article I of the Agreement briefly sets forth the problems it sought to solve and the policies it encouraged:

Article I

> The party States find that charges outstanding against a prisoner, detainers based on untried indictments, informations, or complaints and difficulties in securing speedy trial of persons already incarcerated in other jurisdictions, produce uncertainties which obstruct programs of prisoner treatment and rehabilitation. Accordingly, it is the policy of the party States and the purpose of this agreement to encourage the expeditious and orderly disposition of such charges and determination of the proper status of any and all detainers based on untried indictments, informations, or complaints. The party States also find that proceedings with reference to such charges and detainers, when emanating from another jurisdiction, cannot properly be had in the absence of cooperative procedures. It is the further purpose of this agreement to provide such cooperative procedures.

Article II(a) defines a "State" for purposes of the Act as including the United States of America. Pertinent portions of Article IV provide for transfer of prisoners at the request of the jurisdiction in which an action is pending and for dismissal of the pending charges if the prisoner is not tried prior to his return to the original place of imprisonment:

Article IV

> (a) The appropriate officer of the jurisdiction in which an untried indictment, information, or complaint is pending shall be entitled to have a prisoner *against whom he has lodged a detainer* and who is serving a term of imprisonment in any party State made available in accordance with article V(a) hereof *upon presentation of a written request for temporary custody or availability* to the appropriate authorities of the State in which the prisoner is incarcerated: *Provided*, That the court having jurisdiction of such indictment, information, or complaint shall have duly approved, recorded, and transmitted the request: *And provided further*, That there shall be a period of thirty days after receipt by the appropriate authorities before the request be honored, within which period the Governor of the sending State may disapprove the request for temporary custody or availability, either upon his own motion or upon motion of the prisoner.
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> (e) If trial is not had on any indictment, information, or complaint contemplated hereby *prior to the prisoner's being returned to the original place of imprisonment* pursuant to article V(e) hereof, such indictment, information, or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice. [Emphasis added].

Issue

The sole issue is whether the District Court erred in applying the provisions of the Agreement to the Government's action in using the writs of habeas corpus ad pro-

sequendum,[5] thus treating, in effect, the Agreement as the exclusive means by which the United States may obtain custody of a state prisoner in disposing of pending federal charges.[6]

OPINION

Although the District Court relied on recent decisions in the Second and Third Circuits, holding the Agreement to be the exclusive means of prisoner transfer for prosecution,[7]

[5] The circumstances here resemble those in *United States* v. *Mauro*, 544 F. 2d 588 (2d Cir. 1976) and *United States* v. *Scallion*, No. 74-4246 (5th Cir. Mar. 18, 1977) in that no separate detainer was lodged. *Contra, United States* v. *Cyphers*, Nos. 76-1131, 76-1160 (2d Cir. Feb. 8, 1977), *United States* v. *Ford*, No. 76-1319 (2d Cir. Feb. 3, 1977), and *United States* v. *Sorrell*, 413 F. Supp. 138 (E.D.Pa. 1976).

[6] The Government raises the issue of whether Congress intended the United States to participate in the Agreement as a "sending state" but not as a "receiving state." In our view of the case, it is unnecessary to decide the question posed, no detainer having been lodged. We find, however, no expression of such intent in the statute. On the contrary, Article II(a) defines a State as "a State of the United States; the United States of America; * * * Puerto Rico." Articles II(b) and (c) define sending and receiving State without distinguishing the United States. Were we required to decide the question, we would, on this record, conclude that the United States participates as both a sending and a receiving State and that when it lodges a detainer, as it did in *Cyphers*, *Ford* and *Sorrell*, *supra* note 5, the United States must comply with the Agreement. We would note, in passing, the absence of stated reasons in support of the Government's effort to deny itself the option of proceeding under the Agreement.

[7] See, e.g., *United States* v. *Sorrell*, *supra* note 5, *United States* v. *Mauro*, *supra* note 5, aff'g 414 F. Supp. 358 (E.D.N.Y. 1976), and *U.S. ex rel. Esola* v. *Groomes*, 520 F. 2d 830 (3d Cir. 1975). We note that the latter case does not involve transfer from state to federal custody, but the reverse situation which is similar to that in *Smith* v. *Hooey*, 393 U.S. 374 (1969) and in *Dickey* v. *Florida*, 398 U.S. 30 (1970), the only cases cited in the House or Senate Judiciary Committee Reports on the Agreement bill. See H.R. REP. NO. 91-1018, 91st Cong., 2d Sess. 2 (1970); S.REP. NO. 91-1356, 91st Cong., 2d Sess. 2 (1970), *reprinted in* [1970] U.S. CODE CONG. & AD. NEWS, 4864. Both deal with the primary purpose of Article IV, i.e., the elimination of abuses of detainers by states. Neither *Smith* nor *Dickey* mentions any problems associated with the use of writs of habeas corpus ad prosequendum by federal prosecutors. See *United States* v. *Scallion*, *supra* note 5, slip op. at nn. 5 & 6. The Sixth Circuit has recently concluded that the issuance of a writ of habeas corpus ad prosequendum satisfies both requirements of Article IV(a) of the Agreement, i.e., that a detainer be lodged and that a written request for temporary custody be made. *United States* v. *Roberts*, 548 F. 2d 665, 670 (6th Cir. 1977). However, that court did not discuss the impact of that view on the

we decline to follow those precedents. Our view of the relationship between the Agreement and the writ of habeas corpus ad prosequendum more closely accords with that expressed by the Fifth Circuit in *United States* v. *Scallion*, *supra* note 5, and set forth in *United States* v. *Mauro*, *supra* note 5, (Mansfield, J., dissenting). See also *Adams* v. *United States*, 423 F. Supp. 578, 581 (E.D.N.Y. 1976).

The differences between a detainer and a writ of habeas corpus ad prosequendum, in purpose, legal basis, and historical context, are so fundamental as to constitute each a separate, distinct avenue for obtaining custody of prisoners for federal prosecution.

A detainer is a formal notification, lodged with the authority under which a prisoner is confined, advising that the prisoner is wanted for prosecution in another jurisdiction. S.REP. NO. 91-1356, 91st Cong., 2nd Sess. 2, *reprinted in* [1970] U.S. CODE CONG. & AD. NEWS, 4864, 4865. Long before the enactment of the Agreement, a detainer was treated as merely a request that the prisoner not be released until he could be taken into custody by the requesting state. In a sense, it was a request that the prisoner be placed on the "will call" shelf, and many prisoners labeled "will call" were never called for. On the other hand, the sending state was under no obligation to detain or deliver the prisoner except as it might choose to do so, a privilege maintained in modified form by Article IV(a) of the Agreement, which provides that the Governor of the requested state may refuse the request within 30 days after its receipt. The Agreement, as above indicated, added to the ancient practice the penalty of dismissal for failure to

continued viability of 28 U.S.C. § 2241, because its judgment rested on the pre-trial detainee status of one appellant.

The issue before us is currently also before the Eighth Circuit in *Speed* v. *United States*, No. 77-1126, and before the Ninth Circuit in *United States* v. *Adkins*, No. 76-3526. The Third Circuit vacated its opinion in *United States* v. *Sorrell*, No. 76-1647, and has set the case for rehearing en banc.

prosecute the prisoner obtained in response to lodgement of a detainer.

A federal writ of habeas corpus under § 2241 is by contrast a federal court order, commanding the presentation of a prisoner for prosecution or as a witness in a federal court. It is judicially controlled by the federal district court, which may issue it for the production of a prisoner when "it is necessary to bring him into court to testify or for trial." 28 U.S.C. §2241(c)(5). Upon receipt of such a writ, state authorities deliver the prisoner in accordance with its terms and in compliance with §2241.[8] If the court which issued the writ is satisfied that the prisoner's presence is no longer needed or will not be required temporarily, as occurred in this case following Kenaan's arraignment and his presentation of a guilty plea, it may order the prisoner returned to state custody.

Analysis of the abuses which Congress and the states sought to curb with the Agreement further illustrates the differences between the detainer and the writ. Described only as "uncertainties which obstruct programs of prisoner treatment and rehabilitation" in Article I of the Agreement quoted above, the abuses and their results were many. Prior to the Agreement, detainers were filed indiscriminately, often with no notification to the prisoner, on mere suspicion, and without procedural safeguards. Outstanding detainers frequently provided grounds for denial of parole, participation in special work, athletic and release programs, visiting privileges, and minimum security status. Normally, a prisoner was required to serve out his sentence in the first jurisdiction before being tried in the second, impeding

[8] It appears that no state has ever refused to honor the writ and the Supreme Court has found it unnecessary to decide whether the Supremacy Clause requires the states' obedience. *Carbo* v. *United States*, 364 U.S. 611 (1961). In the unlikely event of such a confrontation, we are confident that the writ would be held enforcible. See *United States* v. *Mauro*, *supra* note 5, at 596 n.1 (Mansfield, J., dissenting) and *United States* v. *Scallion*, *supra* note 5, slip op. at n.7.

chances for successful rehabilitation, hindering judges in rendering appropriate sentences, preventing concurrent service of sentences in the two jurisdictions and, as indicated in Article I of the Agreement, hindering parole and prison authorities in devising an appropriate rehabilitation program for the prisoner concerned. Long delays before trial in the second jurisdiction were prejudicial to the prisoner's defense as evidence was lost, witnesses disappeared, and memories faded. The mechanics of transfer were complicated by an absence of uniform rules and states were often reluctant to give up prisoners at all.[9] The Agreement was specifically designed to remedy these problems by clearing detainers against a prisoner through prompt disposition of charges in another jurisdiction.

A writ of habeas corpus ad prosequendum, however, has never been associated with any of the foregoing problems. As a court order, it is carried out immediately and is discharged when the prisoner is returned to state custody, unlike the detainer which had remained outstanding against the prisoner prior to the Agreement. While federal charges may remain pending against a prisoner after discharge of a writ, as was the case following Kenaan's unaccepted offer of a guilty plea, that situation does not involve the potential for abuse intended to be corrected by the Agreement.[10] We share the District Court's concern, and that of the other federal courts which have expressed it, that Article IV(e) of the Agreement not be made "meaningless," which could occur if federal authorities were to employ the writ as merely a means of circumventing the strictures of the Agreement. Our concern is lessened if not dissipated, how-

[9] For a more detailed account of the numerous problems which led to passage of the Agreement, see the thorough opinion accompanying the decision in *United States* v. *Ford*, *supra* note 5.

[10] In this case Kenaan would have been confined in the same facility if held in federal custody during the conduct of his trial. Though argued by the Government, the coincidence has not influenced our decision.

ever, by two further considerations. First, the concern rests on a hypothetical. The writ and the actions taken pursuant thereto being under the control of the issuing court, we are confident that the court will be alert to, and fully empowered to forestall, potential abuses of the writ. Second, any concern over potential delay-in-trial abuses by the federal Government are further diminished by the provisions of the federal Speedy Trial Act of 1974, 18 U.S.C. §§3161-3174.

Moreover, the construction urged by Kenaan would impliedly repeal or modify the statute establishing the writ, §2241(c)(5), with no mention whatever of the slightest congressional intent so to do in the legislative history of the Agreement. That legislative history is totally silent respecting any effect of the Agreement on traditional federal writ practice.[11] Where two seemingly inconsistent acts can reasonably stand together, a court must interpret them in a manner which gives harmonious operation and effect to both, in the absence of clear and unambiguous expression of Congressional intent to the contrary. *Morton* v. *Mancari*, 417 U.S. 535, 549-551 (1973), *United States* v. *Borden Co.*, 308 U.S. 188, 198 (1939). The presumption against implied repeal is even stronger here in view of the long history of the writ as a part of our legal framework under common law and statute. As stated in *United States* v. *Mauro, supra* note 5, at 597 (Mansfield, J., dissenting):

> The two statutes do not conflict with one another. When they are so easily reconcilable, it is error, in my view, to hold in effect that §2241 is implicitly repealed in part by the Act. See *Rosencrans* v. *United States*, 165 U.S. 257, 17 S.Ct. 302, 41 L.Ed. 708 (1897).

[11] See the more detailed discussion of legislative history in the opinion accompanying the decision in *United States* v. *Scallion, supra* note 5.

Finally, with respect to legislative intent, the apparent conflict between the Agreement and the writ centers about the particular use of the writ involved here, i.e., to produce a prisoner for prosecution. That the writ may be used for production of a prisoner as a witness, as specifically provided for in §2241, is not, however, immaterial to consideration of congressional intent. Thus, if in enacting the Agreement Congress had intended any modification or amendment of §2241 it would have necessarily intended to excise only the words "or for trial" from §2241(c)(5). A total repeal would have discarded the provision for production as witnesses for no apparent reason.[12] The "conflict" between the detainer and the writ, being more apparent than real, constitutes no evidence of congressional intent to repeal §2241, in whole or in part. On the contrary, §2241 remains viable, in our view, in its entirety.

In summary, we hold that Kenaan's transfers to federal custody pursuant to writs of habeas corpus ad prosequendum were not subject to the provisions of the Interstate Agreement on Detainers Act. Accordingly, the order of the District Court granting Kenaan's motion to dismiss the indictment is reversed and the case is remanded for further proceedings not inconsistent herewith.

[12] Transfer of the prisoner under a writ of "habeas corpus ad testificandum" does not, of course, involve the abuses sought to be curbed by the Agreement.

United States Court of Appeals for the First Circuit.

No. 77-1014.

UNITED STATES OF AMERICA,
APPELLANT,

v.

ELIAS A. KENAAN,
DEFENDANT, APPELLEE.

Judgment.

Entered July 7, 1977

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The District Court's order of dismissal is reversed and the case is remanded for further proceedings in accordance with the opinion filed this day.

By the Court:
DANA H. GALLUP, *Clerk*.

United States Court of Appeals for the First Circuit.

No. 77-1014.

UNITED STATES OF AMERICA,
APPELLANT,

v.

ELIAS A. KENAAN,
DEFENDANT, APPELLEE.

Order of Court.

Entered: July 19, 1977

Upon motion of and memorandum of appellee,

It is ordered that mandate be, and the same hereby is, stayed pending the filing and disposition of a petition for writ of certiorari in the Supreme Court of the United States, the same to be filed by the time provided by law and notice of such filing to be filed promptly with the Clerk of this Court.

By the Court:
DANA H. GALLUP *Clerk*.

No. 77-206

In the Supreme Court of the United States

OCTOBER TERM, 1977

ELIAS KENAAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE UNITED STATES

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-206

ELIAS KENAAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 6a-15a) is reported at 557 F. 2d 912. The opinion of the district court (Pet. App. 1a-5a) is reported at 422 F. Supp. 226.

JURISDICTION

The judgment of the court of appeals (Pet. App. 16a) was entered on July 7, 1977. The petition for a writ of certiorari was filed on August 5, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a writ of *habeas corpus ad prosequendum* issued by a federal court to state authorities, directing the production of a state prisoner for trial on federal

criminal charges, constitutes a "detainer" making applicable the terms and conditions of the Interstate Agreement on Detainers Act.

STATEMENT

1. In an indictment filed in the United States District Court for the District of Massachusetts on April 13, 1976, petitioner was charged with three counts of income tax evasion, in violation of 26 U.S.C. 7201, and three counts of knowingly filing false income tax returns, in violation of 26 U.S.C. 7206(1) (App. 3-6).[1] At the time that the indictment was returned, petitioner was incarcerated at a Massachusetts correctional facility serving a sentence on a state criminal charge (Pet. App. 7a). On April 30, 1976, petitioner was transferred from the state facility and produced, pursuant to a writ of *habeas corpus ad prosequendum*, before the district court for arraignment on the indictment. After entering a plea of not guilty, petitioner was returned that same day to the state institution (App. 1, 39-40).

On June 28, 1976, petitioner was again removed from state custody and brought before the district court pursuant to a writ of *habeas corpus ad prosequendum*, this time for the purpose of offering a guilty plea to the indictment. The district court, however, declined to accept the plea. Later that day petitioner was returned to state prison (App. 1-2, 8-10, 11-23, 40).

Petitioner subsequently moved to dismiss the indictment on the ground that he had been produced in federal court and thereafter returned to state prison without having first been tried on the federal charges, in alleged violation of Article IV(e) of the Interstate Agreement on

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[1]"App." refers to the appendix in the court of appeals.

Detainers Act ("Agreement").[2] Article IV of the Agreement provides that the prosecuting authority of a member state in which criminal charges are pending against a defendant serving a prison sentence in another member jurisdiction may lodge a detainer with the prison authority of that jurisdiction and, upon presentation of a "written request for temporary custody," obtain temporary custody of the prisoner for purposes of trial. The Agreement further provides that a prisoner so procured must be tried (a) within 120 days of his arrival in the receiving state (subject to continuances granted "for good cause shown in open court") and (b) prior to being returned to the sending state, or else the charges against him shall be dismissed with prejudice. Articles IV(c), IV(e), and V(c).[3]

2. In granting petitioner's motion to dismiss, the district court held that the Interstate Agreement on Detainers is the exclusive method of securing prisoners from

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[2]The United States joined the Agreement by Act of December 9, 1970, Sections 1-8, 84 Stat. 1397-1403, 18 U.S.C. App., pp. 4475-4478. At all times relevant hereto, Massachusetts was also a party to the Agreement. Mass. Gen. Laws ch. 276, App., Sections 1-1 to 1-8 (1966).

[3]Article III of the Agreement provides an alternative means by which transfer of the prisoner may be accomplished. Under Article III(c), prison officials are required to notify each prisoner of any criminal charge on the basis of which a detainer has been lodged against him by another jurisdiction and, further, to inform the prisoner of his right to request trial on the charges underlying the detainer. The prisoner may then act to clear such a detainer by filing a request with the appropriate authorities in the prosecuting jurisdiction for final disposition of the charge against him. He must thereupon be brought to trial (a) within 180 days of delivery of this request and (b) without being returned to the sending state after his transfer to the prosecuting state, or else the charges are subject to dismissal with prejudice. Articles III(a), III(d), and V(c).

member states for trial on federal charges,[4] and that petitioner's transfer from state prison to federal court and his return to state prison without being brought to trial on the indictment required dismissal of the indictment with prejudice, pursuant to Article IV(e) of the Agreement (Pet. App. 1a-5a).

On the government's appeal, the court of appeals reversed the district court's order of dismissal (Pet. App. 6a-15a). In so doing, the court expressly declined to follow *United States* v. *Mauro*, 414 F. Supp. 358 (E.D. N.Y.) and the other precedents relied upon by the district court (*id.* at 10a-11a). After noting the fundamental differences—in purpose, legal basis, and historical development—between the writ of *habeas corpus ad prosequendum* and a "detainer" (as the latter term is defined in the Senate Judiciary Committee Report accompanying the Act),[5] the court held that the writ and detainer each constitutes "a separate, distinct avenue for obtaining custody of prisoners for federal prosecution" (*ibid.*). On this basis, the court

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[4]In support the district court cited *United States* v. *Sorrell*, 413 F. Supp. 138 (E.D. Pa.), affirmed, C.A. 3 (*en banc*), No. 76-1647, August 22, 1977; and *United States* v. *Mauro*, 414 F. Supp. 358 (E.D. N.Y.), affirmed, 544 F. 2d 588 (C.A. 2), certiorari granted, October 3, 1977 (No. 76-1596). It also relied on *United States ex rel. Esola* v. *Groomes*, 520 F. 2d 830 (C.A. 3) (Pet. App. 4a), but, as the court of appeals recognized (Pet. App. 10a n. 7), that case does not involve a transfer from state to federal jurisdiction, but rather the transfer, pursuant to a state writ of *habeas corpus ad prosequendum*, of a federal prisoner for trial on state charges.

[5]The writ derives from ancient common law usage and more particularly from Section 14 of the First Judiciary Act, 1 Stat. 81. See *Carbo* v. *United States*, 364 U.S. 611, 614.

The detainer is of much more recent vintage and is nothing more than a notification, from one State to another, that a particular inmate is wanted to face charges in the notifying State.

concluded that the transfers of petitioner to federal court pursuant to the writ of *habeas corpus ad prosequendum* did not activate the provisions of the Agreement.[6]

DISCUSSION

The petition here raises the same question that is presented in *United States* v. *Mauro*, No. 76-1596:[7] Whether a federal writ of *habeas corpus ad prosequendum* issued to secure the presence of a state prisoner for trial on federal charges constitutes a "detainer" rendering applicable the terms and conditions of the Interstate Agreement on Detainers Act.[8] As this Court has recently granted our petition in *Mauro*, we suggest that this Court defer decision on the present petition pending ~~its disposition of our~~ final disposition of that case.

We note, however, that the Second Circuit, which decided *Mauro*, has declined to apply the Agreement to transfers by a writ of *habeas corpus ad prosequendum* where the

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[6]Although it noted that petitioner would have been confined in the same facility if he had been held in federal "custody" during his trial, the court stated that this coincidence had not influenced its decision (Pet. App. 13a n. 10). But see *United States* v. *Sorrell* and *United States* v. *Thompson*, C.A. 3, Nos. 76-1647 and 76-1976, decided August 22, 1977 (*en banc*) (separate dissenting opinions of Weis, J. and Garth, J.).

[7]We are providing petitioner with a copy of our petition in *Mauro*.

[8]The question presented here is also related to the questions raised in *United States* v. *Ford*, No. 77-52, certiorari granted, October 3, 1977, and *United States* v. *Ferro*, No. 77-326, in which the United States has sought review of decisions of the Second Circuit holding that Article IV of the Agreement governs the transfer of a state prisoner by a federal writ of *habeas corpus ad prosequendum* after a "detainer" had been filed against him with state prison authorities. In the *Ford* and *Ferro* petitions we have also presented the additional question whether the defendant waived his claim under the Agreement by failing to raise it in the district court.

transferred defendant remained in federal custody but a few hours. *United States* v. *Chico*, 558 F. 2d 1047. In that case the court held that Article IV(e) of the Agreement "does not apply to a case where a prisoner is removed from the prison of a state for a few hours to be arraigned, plead and be sentenced in the federal court without ever being held at any place of imprisonment other than that of the sending state and without interruption of his rehabilitation there" (*id.* at 1049). The facts in this case are, perhaps, even more compelling than in *Chico*, since petitioner would have remained in the same correctional institution even if "custody" of petitioner had formally passed from state to federal authorities (Pet. App. 13a, n. 10). We recognize that the Third Circuit has taken a different view on this issue, however, *United States* v. *Thompson, supra,* and thus believe that our recommendation to defer consideration of this petition pending disposition of *Mauro* remains appropriate.

CONCLUSION

The petition for a writ of certiorari should be disposed of as appropriate in light of this Court's disposition of *United States* v. *Mauro, supra.*

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

OCTOBER 1977.